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No. 84-632

In the

Supreme Court of the United States

OCTOBER TERM, 1984

ALLAN WILK AND PALOS VERDES SHORES MOBILE ESTATES, LTD.,
APPELLANTS
v.
PEOPLE OF THE STATE OF CALIFORNIA,
APPELLEE

ON APPEAL FROM THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT, STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

Appellants' Brief in Opposition to Appellee's Motion to Dismiss or Affirm

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1. In light of the questions posed at oral argument in *Wayte* v. *United States*, No. 83-1292, on November 6, 1984, appellant respectfully suggests that the most appropriate disposition of this case is not to hold it pending the resolution of *Wayte* and then vacate it in light of whatever opinion is handed down there

(*see* JS at 28),[1] but simply to set this case down for plenary briefing and argument at the earliest available time. Several Justices asked during the *Wayte* argument how there could be a First Amendment problem if *all* non-compliers who turned themselves in, or were turned in by others, were given a full opportunity to avoid criminal prosecution by registering when formally "begged" to do so. (*See, e.g.*, Tr. of Oral Arg. at 15, 18, 19 (Stevens, J.); *id.* at 26 (O'Connor, J.).) How was free speech burdened or discriminated against unless the chance to comply, and thereby avoid prosecution for prior violations, was *withheld* from some non-compliers because of what they had said?

This is that case: whatever the situation in *Wayte*,[2] the "fast-track" exception to the beg policy in the Los Angeles Rent Moratorium Ordinance operated *precisely* to withhold the chance to comply, and thus escape criminal prosecution, on the basis of what the individual had *said* about the rent control provisions and their alleged application to his conduct.[3] Thus this case involves anything *but* the "elective prosecution" that the Solicitor General sought to depict *Wayte* as entailing (Tr. at 37): those who, like Mr. Wilk, said things the government deemed unreasonable were altogether *denied* the opportunity for elec-

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[1] References to the Motion to Dismiss or Affirm will be designated "MD" followed by the appropriate page number. References to the Jurisdictional Statement will be designated "JS"; and references to the Appendix to the Jurisdictional Statement will be designated "App."

[2] Counsel of record here, co-counsel for petitioner in *Wayte*, by no means concedes that petitioner there suffered no First Amendment violation.

[3] Unlike the failure to register for the draft that is involved in *Wayte*, and unlike a failure to comply with the handgun registration law hypothesized during oral argument in *Wayte* (Tr. at 44, 45 (Burger, C.J.)), violations of the rent moratorium were not "crimes without witnesses." The tenants who believed that they were being overcharged were always witnesses, and tenant complaints to the city Housing Office initiated nearly all investigations of rent moratorium violations.

tion between compliance and prosecution that *all others* routinely received.

2. Despite the thirty-day extension of time in which to file its Motion to Dismiss or Affirm, Appellee's motion offers no refutation whatsoever to the *merits* of Wilk's constitutional challenges to the Two-Track enforcement system under which he was singled out for immediate prosecution on the basis of his exercise of his First Amendment rights to speak freely and to petition the government for redress. Furthermore, although even an "improvidently taken" appeal "shall be regarded and acted on as a petition for writ of certiorari . . . duly presented to the Supreme Court at the time the appeal was taken," 28 U.S.C. § 2103, Appellee addresses only the posture in which Appellant's challenge to the validity of the *statute* reaches this Court (MD 7-9), saying literally nothing about whether the questions presented, if regarded as seeking review on certiorari, merit such review. Choosing a strategy of obfuscation, Appellee seeks to preclude this Court's review on appeal *and* on certiorari by obscuring the procedural posture of the case and the state of the record with a flurry of dubious and undocumented declarations.

3. Appellee first contends that Wilk's challenge to the Two-Track beg policy as a violation of the First and Fourteenth Amendments cannot be considered by this Court because "the trial court was never asked to pass on the constitutionality" of the beg policy during the pretrial hearing on Wilk's motion to dismiss the charges. (MD at 8-9.) But this appeal is, of course, taken from the decision of the Appellate Department of the Los Angeles Superior Court that affirmed Wilk's convictions, *not* from a ruling of the trial judge on a pre-trial motion to dismiss, or indeed from *any* ruling of the trial court. Nowhere in its motion does Appellee dispute that Wilk's First and Fourteenth Amendment challenges to the Two-Track System were adequately presented to and ruled upon by the state appellate court.

In any event, the appellate court clearly stated in its opinion: "Defendants argue that they should have been given an opportunity to comply with the Ordinance before charges were brought as this was the policy of the city. . . . It is true that Wilk in being outspoken against the Ordinance was exercising his First Amendment rights, but his adamant attitude also was a legitimate basis for not providing defendants" with the routine avoidance opportunity embodied in the official "beg policy." (App. 18-19.)[4]

In rejecting Wilk's constitutional objections to the Ordinance and its implementing guidelines and procedures, the court below obviously and necessarily decided the constitutionality of the Ordinance and its Two-Track System as construed and applied. "That is sufficient under [this Court's] practice." *Jenkins* v. *Georgia,* 418 U.S. 153, 157 (1974). *Cf. Furman* v. *Nichol,* 75 U.S. (8 Wall.) 44, 55-56 (1868). The jurisdictional requirement of 28 U.S.C. § 1257(2) calls "not for some abracadabra," *Flournoy* v. *Wiener,* 321 U.S. 253, 264-65 (1944) (Frankfurter, J., dissenting), but demands instead a commonsense assessment of the questions presented to the court below in express terms and by necessary implication. *See Wilson* v. *Black Bird Creek Marsh Co.,* 27 U.S. (2 Pet.) 245, 249 (1829). Where, as here, "it appears from the opinion of the state court . . . that a state statute was drawn in question, as repugnant to the Constitution, and that the decision of the court was in favor

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[4] Appellee unduly restricts its focus to the denial to Wilk of an *office hearing*, at which alleged violations of the Ordinance were discussed. The Jurisdictional Statement demonstrated in carefully documented detail — and Appellee does not deny — that Wilk was denied *every aspect* of the beg policy, including the routine office hearing *and* the formal letter providing a last clear chance to avoid criminal prosecution by prospective compliance. Wilk argued both in the appellate court and in his petitions for hearing (Petition, text accompanying nn. 14, 17, 22, 26, 28) or for writs of certiorari or mandate (Petition, text accompanying nn. 14, 17, 28) to the California Supreme Court that the Two-Track System denied him the benefits of the beg policy on the basis of his protected speech.

of its validity, [this Court] ha[s] jurisdiction on appeal. For we need not inquire how and when the question of the validity of the statute was raised when such question appears to have been actually considered and decided by that court." *Charleston Federal Savings & Loan Ass'n* v. *Alderson*, 324 U.S. 182, 185-86 (1945).

4. Appellee also contends that Wilk raises "for the first time" in the Jurisdictional Statement a *facial* challenge to the Ordinance's beg policy. (MD at 8-9, 10.) Appellee is mistaken, for *Wilk* has *never* attacked the Ordinance on its face. Appellant has, however, consistently attacked the Ordinance's enforcement policy as authoritatively *construed* and *applied* to him by the courts of California. (*See, e.g.*, JS at 17, 18 n.15, 22.) Appellee *does not deny* that the courts below did indeed construe and apply the Two-Track System in a manner that violates the First and Fourteenth Amendments.

5. The primary thrust of Appellee's Motion to Dismiss is an attempt to create a controversy over the record that Appellee evidently hopes would lead a burdened Court to decline plenary review of this case, whether under 28 U.S.C. § 1257(2) or under 28 U.S.C. § 1257(3). Appellee's first argument in this regard is that the constitutional challenges in the Jurisdictional Statement rely primarily on evidence which was entered into the record during Wilk's trial, but which was not considered by the appellate court in reviewing Wilk's conviction and which therefore may not be considered by this Court. According to Appellee, the only evidence this Court may consider is that adduced during the pre-trial hearing on the motion to dismiss. (MD at 3, 5, 11.) This contention is frivolous. Appellee has apparently forgotten that this appeal is taken not from the denial of a preliminary motion by the trial court, but from the decision of the Appellate Department of the Superior Court that affirmed Wilk's conviction and upheld the Two-Track System. That court stated, in the same paragraph wherein it began review of

Wilk's First Amendment challenge, that "[t]his court must review the *whole* record. . .." (App. at 18) (emphasis added.) Despite Appellee's understandable aversion to those portions of the record that indisputably establish the unconstitutionality of its beg policy (e.g., the trial record), that entire record is undoubtedly before this Court. Nothing in Appellant's citations to that record having been questioned with particularity by Appellee, the Court may safely disregard Appellee's conclusory and self-serving description of how this case appears "[a]fter due consideration is given to the factual record below." (MD at 11.)

6. The final — and the flimsiest — assertion offered by Appellee is that the Jurisdictional Statement rests upon a version of the facts in this case that is somehow unsupported by the record. (MD at 5-7, 9-11.) This cavalier and wholly undocumented assertion is Appellee's only response to the detailed and meticulously documented presentation of the case in the Jurisdictional Statement. If such unsupported characterizations were sufficient to side-step this Court's exercise of its appellate jurisdiction, prosecutorial retaliations for peaceful but outspoken opposition to government would go forever unreviewed and unremedied.

Fortunately, there is no need for this Court to undertake a tedious review of the facts in this case in order to see that Appellee's bald assertion deserves no weight.[5] Both the trial (App. 28-29) and appellate courts (App. 3, 5-6, 19) found that the decision to prosecute Wilk without affording him the benefits of

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[5] Of course, "the long course of judicial construction . . . establishes as a principle that the duty rests on this Court to decide for itself facts or constructions upon which federal constitutional issues rest." *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110, 121 (1954). "[T]his has been particularly true where rights have been asserted under the First Amendment guarantees of free expression." *Jacobellis* v. *Ohio*, 378 U.S. 184, 189 (1964) (numerous citations omitted). Again, however, consideration of this case would entail no immersion into a tangled skein of facts.

the official beg policy was based on the facts that the prosecution considered Wilk's written and oral opposition to the Ordinance to be "adamant" and "outrageous" and that the prosecution deemed Wilk's legal position on the Ordinance to be "bizarre" and "specious." (JS 12-13, 24.)[6] In a moment of candor that Appellee would presumably prefer to ignore, the Criminal Branch attorney who was in charge of all rent control cases testified, without contradiction, that Appellant's alleged violations of the Ordinance were "not the sum total of the reasons for the filing of a [criminal] complaint against Mr. Wilk." (JS 13-14, 24-25.)[7]

Whatever the nitty-gritty facts, it bears emphasis that Appellee makes no effort whatsoever to deny — and indeed could not plausibly deny — that the appellate court below *expressly held* that the exercise of one's First Amendment rights to speak and to petition the government is a legitimate basis for denying an already identified non-complier the benefits of an official beg policy routinely afforded to all other non-compliers. (App. 18-19.) That undisputed fact alone is sufficient to warrant plenary review by this Court, given the undisputed importance of the issue presented, its palpable proximity to the questions already briefed and argued in *Wayte*, and its pivotal place in the problems of fairly enforcing criminal sanctions against businessmen who evidence a desire to comply with ambiguous economic regulations.

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[6] As the reference "RTM" in most of the record citations indicates, the vast majority of the facts on which the Jurisdictional Statement relies in fact come from the pre-trial hearing on the motion to dismiss — that part of the record that even Appellee agrees is properly before this Court.

[7] The testimony appears at RTM (1B) 27.

Conclusion.

For the foregoing reasons, the Motion To Dismiss Or, In The Alternative, To Affirm should be denied and this Court should either note probable jurisdiction or, treating this appeal as a petition for a writ of certiorari, should grant certiorari.

Respectfully submitted,

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